

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1969-2341-2366

To be argued by
GERALD E. PALEY

United States Court of Appeals
FOR THE SECOND CIRCUIT

IIT, an International Investment Trust, and GEORGES BADEN,
JACQUES DELVAUX and ERNEST LECUIT, as Liquidators for IIT, an International Investment Trust,

Plaintiffs-Appellees-Cross-Appellants,

—against—

VENCAP, LTD., INTERVENT, INC., INTERCAPITAL, N.V.,
RICHARD C. PISTELL, CHARLES E. MURPHY, JR.,
DAVID TAYLOR and HAVENS, WANDLESS, STITT &
TIGHE,

Defendants-Appellants-Cross-Appellees,

and

WALTER BLACKMAN,

and

ROBERT L. VESCO, MILTON F. MEISSNER,
NORMAN LeBLANC and STANLEY GRAZE,

Defendants.

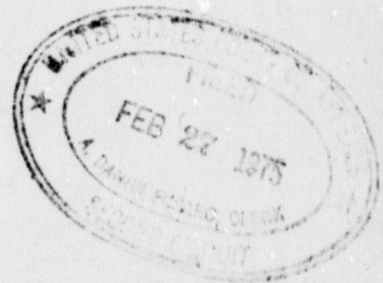
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF
DEFENDANTS-APPELLANTS-CROSS-APPELLEES
Vencap, Ltd., Intervent, Inc., and Intercapital, N.V.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket Nos. 74-1969, 74-2341, 74-2356

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C. PISTELL, CHARLES E. MURPHY, JR., DAVID TAYLOR and
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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VENCAP, LTD., INTERVENT, INC., AND INTERCAPITAL, N.V.

INTRODUCTION

The plaintiffs, in their answering brief, have unfairly attempted to divert the Court's attention from the issues on this appeal to matters they would rather discuss. They have devoted the major portions of their brief to discussions about: (1) Robert L. Vesco ("Vesco") who has at best a marginal connection with this case and has no connection whatsoever with the issues on appeal; and (2) an alleged conspiracy which Judge Stewart refused to find. This approach is a transparent attempt to transfer negative feelings about Vesco to the parties in this case.

Plaintiff's brief contains scant discussion of the issues that are before this Court.

Plaintiffs have totally failed to show any reason why this Court should disturb Judge Stewart's Order relating to Vencap's Cameroons investment.*

* Since we are advised that the reply briefs of the other defendants will address themselves to the issue of the Court's jurisdiction, that issue will not be discussed in this reply brief and the reply briefs of the other defendants are hereby incorporated by reference.

POINT IPLAINTIFFS ATTEMPT TO MAKE
THIS A "VESCO" CASE

Throughout their brief plaintiffs refer to Vesco. Despite the fact that he is only tangentially involved in this case, his name appears on page after page. Indeed, the word "Vesco" appears, cover to cover, no fewer than eighty times. Frequently the name is given undue prominence in subtle ways, such as by placing his name first in lists of names (See, e.g., plaintiffs' brief at pp. 5, 11, and 14).

By attempting in this manner to create the impression that Vesco is a central figure in this case, plaintiffs are obviously hoping to capitalize on the notoriety surrounding Vesco. They seem to be convinced that they can successfully persuade this Court to punish these defendants (who are before this Court) for the sins of Vesco (who is not before this Court).

This is particularly obvious in their quoting of Judge Wyatt's reference to Vesco's attempting to spirit a yacht out of the country and "laughing up his sleeve" (See plaintiffs' brief at pp. 43 and 67). It is almost as if plaintiffs were saying that since Vesco is unavailable, somebody else must pay the price in his place.

As part of this same tactic plaintiffs talk about "Related Cases" (See page 10 of their brief) and tack on an "Appendix" of a "List of IOS Related Cases" Neither Vencap nor Pistell is involved in any of those cases, nor is the case at bar in any manner related to any such cases.

Plaintiffs' reliance upon their attempt to create a species of "guilt by association" serves merely to indicate their own appraisal of the strength of the evidence they have presented.

POINT II

PLAINTIFFS ATTEMPT TO RELY ON THE REJECTED CONSPIRACY THEORY

In a similar vein, plaintiffs continue to refer to the alleged conspiracy even though this theory was rejected by the lower Court.

Under this theory, the three-page memorandum was a mere sham intended to serve merely as window dressing. On this subject Judge Stewart was specific, stating that, based upon the evidence presented, "such an inference of sham will not be made. This Court finds that the apparent purpose of the memorandum, that of being part of Vencap's

inducement to IIT, was the reason for its preparation and use" (A954a).

Apparently, plaintiffs are reluctant (and, it is submitted, with good reason) to rely exclusively upon the three-page memorandum, which was the sole basis upon which Judge Stewart rested his decision. Since Judge Stewart rejected the conspiracy theory, plaintiffs, if they are to succeed, have the burden of showing that the three-page memorandum was indeed actionable.

. POINT III

PLAINTIFFS' FAILURE TO
RESPOND TO DEFENDANTS'
POINTS CONCERNING THE
THREE-PAGE MEMORANDUM

The reason is apparent why plaintiffs devote so much attention to discussions about Vesco and the rejected conspiracy theory. They evidently have very little to say about the central substantive issues on this appeal, i.e. those concerning the three-page memorandum.

Other than several verbatim quotations from Judge Stewart's opinion on this issue (plaintiffs' brief pp. 48-50), plaintiffs made absolutely no attempt to show that the memorandum was misleading, that there were any material omissions from the memorandum, or that the conduct of the parties would have been different in any way had the

memorandum never existed.

It may be significant that plaintiffs quote rather than restate Judge Stewart's opinion in this crucial area. Apparently they either fail to understand the decision or they are reluctant to make certain of the statements their own. In any event, they have contributed nothing helpful in resolving these issues.

POINT IV

PLAINTIFFS' ERRONEOUS AND MISLEADING STATEMENTS

Plaintiffs' brief is replete with statements that are distortions of varying degree.

By way of example, plaintiffs state that Vencap "had no security" for a \$590,000 loan which Pistell received from Intercapital (plaintiffs' brief p. 28). The fact is that the loan was fully collateralized by Pistell's pledge of his Flag Redfern stock to Intercapital who had in turn re-pledged that stock to the lending bank. In the event of a default on the loan: (1) the lending bank could foreclose on the stock, and the testimony was that such action would be the normal procedure for the bank rather than to proceed against Vencap's time deposit with it; and (2) if the bank did look to the time deposit, Vencap would be subrogated to the

bank's rights against the stock (A584a-93a, A524a-26a, A1644a-48a).

Similarly plaintiffs state that "The defendants have failed thus far to answer the complaint" (plaintiffs' brief p. 7, emphasis added), thereby attempting to suggest default or delinquency on defendants' part. The fact, well known to plaintiffs, is that defendants' time to answer has been extended by stipulation and answers are not yet due.

POINT V

PLAINTIFFS' ATTACK ON THE CAMEROONS ORDER

Plaintiffs' treatment of their appeal concerning The Cameroons Order is also less than helpful. Although they quite clearly communicate their feeling that the Order should be reversed, they totally fail to state any grounds that would justify a reversal. They make no specific objections of any kind to the Order.

Plaintiffs seem to be saying that once Judge Stewart's Order appointing the receiver was made, there was no way for even the Court to allow Vencap to continue in business to any degree. If that were a correct interpretation of his Order, it certainly highlights the fact that the Order should never have been granted. However, it is clear that such could not be a correct interpretation of the Order.

Surely Judge Stewart had discretion to make subsequent Orders relating to the original Order placing Vencap's assets under the control of the receiver accountable to him and had the discretion to allow Vencap's business to proceed under the Court's aegis.

CONCLUSION

Plaintiffs' brief (1) addresses itself in large part to Vesco and other irrelevant matters, (2) addresses itself in large part to the conspiracy theory rejected by the lower Court, and (3) fails to address itself adequately to the key issues concerning the asserted actionability of the three-page memorandum. Plaintiffs' brief also totally fails to demonstrate any reason for reversing Judge Stewart's Order relating to The Cameroons.

For the reasons stated in the briefs of all defendants, (1) the complaint should be dismissed, (2) the receiver should be discharged and (3) the corporate defendants should be restored to possession of their assets. In any event, the cross-appeal should be denied in its entirety.

Respectfully submitted,

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Service of 2 copies of this within

Reply Brief is admitted this

27 day of February 1975

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Cross-Appellees Charles E. Murphy, Jr. et al.

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BY: [Signature]

DATE 2/27/75

TIME 3:10 P.C.

Attorney for Defendant - Appellant - Cross Appeal Richard C. Pistell

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FEB 27 1975

Arthur A. Manistier, Esq.

By: E. Faus -